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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BEATRICE COHEN et al.,

Plaintiffs and Appellants,

v.

NUVASIVE, INC.,

Defendant and Respondent.

B194078 (Consolidated with B196905)

(Los Angeles County

Super. Ct. Nos. BC311865,

BC311805, BC312189, BC318149,

BC331656, BC348376)

SUSAN SZYMANSKI et al.,

Plaintiffs and Appellants,

v.

NUVASIVE, INC.,

Defendant and Respondent.

APPEALS from judgments of the Superior Court of Los Angeles County,
Carolyn B. Kuhl, Judge. Affirmed.

Kiesel Boucher Larson, Raymond P. Boucher, Michael Eyerly; Arias, Ozzello &
Gignac, Mike M. Arias, Arnold C. Wang; Lieff, Cabraser, Heimann & Bernstein,
Barry R. Himmelstein and Kent L. Klautdt for Plaintiffs and Appellants.

Morris Polich & Purdy, Roger G. Perkins, Mark E. Hellenkamp,
Richard H. Nakamura, Jr., and Maureen M. Home for Defendant and Respondent.

O'Melveny & Myers, Richard B. Goetz, Sabrina H. Strong and Carlos M. Lazatin for DePuy Mitek, Inc., and Johnson & Johnson as Amici Curiae on behalf of Defendant and Respondent.

I. INTRODUCTION

Plaintiffs Beatrice Cohen, Susan Szymanski, and others are close family members of decedents who donated their bodies to the Willed Body Program at the University of California at Los Angeles (UCLA) for medical research and education. Plaintiffs sued NuVasive, Inc. (NuVasive) for negligence, alleging that NuVasive illicitly purchased donated bodies and body parts from the Willed Body Program and that those sales were contrary to UCLA's representations to donors and family members. Plaintiffs allege that NuVasive knew or should have known the sales were improper, that NuVasive mistreated and misused the remains, and that as a result the plaintiffs suffered emotional distress. The trial court sustained demurrers to negligence causes of action without leave to amend and ordered the complaints against NuVasive dismissed. Plaintiffs appeal the judgments of dismissal.

The plaintiffs contend that UCLA owed them duties of care based on promises and representations UCLA made to donors and to plaintiffs, and that NuVasive can be held liable for negligence for inducing UCLA to breach duties owed to the plaintiffs. Based on *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244 (*Conroy*) and our opinion in *Regents of the University of California v. Superior Court* (Apr. __, 2010, B210693) __ Cal.App.4th __, which we file today, we conclude that UCLA did not owe plaintiffs a duty of care regarding the treatment and disposition of donated bodies, and that representations UCLA made to plaintiffs or donors outside the document of gift did not create legal duties to plaintiffs. Consequently NuVasive cannot be held liable for

allegedly inducing UCLA to breach its duties. We therefore affirm the judgments of dismissal.

II. FACTUAL AND PROCEDURAL BACKGROUND

Cohen and others filed separate class action complaints against the Regents of the University of California (the Regents) and others, alleging the improper purchase and sale of human remains that had been donated to UCLA's Willed Body Program. The court ruled that the actions were related and ordered the filing of a first amended master class complaint. A second amended master class complaint followed in April 2006 against defendants the Regents, Henry Reid as the former director of the UCLA Willed Body Program, Johnson & Johnson, DePuy Mitek, Inc. (DePuy Mitek), NuVasive, and others. In that complaint the Cohen plaintiffs alleged that they were close family members of decedents, who entered into written agreements with UCLA by which the decedents donated their bodies to the Willed Body Program for teaching and scientific research. They alleged that in written materials provided to potential donors, UCLA represented that the bodies would be treated with dignity and respect and that "[o]nly medical faculty, students, staff, or students in health-related professions" would have access to donated remains. They also alleged that UCLA represented that state law prohibited sale of bodies or body parts, and that donated bodies would be cremated and the remains scattered in a rose garden or that the bodies would be disposed of in some other proper and dignified manner. They alleged that UCLA improperly sold bodies and body parts to the corporate purchaser defendants, who knew or reasonably should have known that the donated bodies were not intended for sale or for the uses to which defendant purchasers put the bodies. They alleged further that the defendants mistreated bodies and remains and used a middleman as part of a fraudulent scheme to avoid detection. As against the corporate purchaser defendants, the complaint alleged causes of action for, *inter alia*, negligence. NuVasive demurred to the complaint.

On July 21, 2006, the trial court found that the complaint failed to allege facts sufficient to constitute a cause of action against NuVasive, sustained NuVasive's demurrer without leave to amend, and in a judgment of dismissal ordered plaintiffs'

second amended master class complaint dismissed with prejudice as to NuVasive, Inc. The plaintiffs appealed the judgment (No. B194078).

Szymanski and other plaintiffs in March 2006 separately filed a complaint against the Regents, Johnson & Johnson, DePuy Mitek, NuVasive, and others. They alleged causes of action against all defendants, inter alia, for negligence. The case was assigned to the same judge as the *Cohen* action. The trial court sustained without leave to amend NuVasive's demurrer to causes of action alleged against NuVasive and entered a judgment dismissing the Szymanski complaint. The Szymanski plaintiffs appealed the judgment (No. B196905). We consolidated the two appeals.¹

Our prior opinion in this case filed on July 2, 2008, concluded that the facts alleged in the complaint were sufficient to establish a duty of care owed by NuVasive to the plaintiffs, as necessary to support the negligence cause of action. We reversed the judgments with directions to vacate the order sustaining the demurrer to all causes of action without leave to amend and enter a new order overruling demurrer to the negligence cause of action and sustaining the demurrer without leave to amend as to the other causes of action.

The California Supreme Court granted review (No. S166020) and deferred further action or briefing pending its decision in *Conroy v. Regents of the University of California* (No. S153002). After filing its opinion in *Conroy v. Regents of the University of California*, *supra*, 45 Cal.4th 1244, the Supreme Court transferred the cause to this court with directions to vacate our decision and reconsider the appeal in light of *Conroy*. After reconsidering this appeal in light of *Conroy*, we now affirm the sustaining of the demurrers and affirm the judgments.

¹ Further references to "the plaintiffs" include both the Cohen and Szymanski plaintiffs.

III. ISSUES

The plaintiffs contend that (1) UCLA had a duty to relatives of decedents who donated their bodies to the willed body program to treat the bodies in the manner promised by UCLA, and (2) NuVasive induced UCLA to breach that duty.

IV. DISCUSSION

1. *Standard of Review*

A general demurrer tests the legal sufficiency of factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) We construe the complaint in a reasonable manner and read the allegations in context. (*Ibid.*) We must affirm the judgment if it is correct for any reason, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

The sustaining of a demurrer without leave to amend is an abuse of discretion if there is a reasonable possibility that amendment can cure the defect. (*Schifando, supra*, 31 Cal.4th at p. 1081.) The plaintiff bears the burden of showing how the complaint could be amended and how the amendment would change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) A plaintiff may make that showing for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

2. *UCLA Owed No Duty to Plaintiffs, and Therefore NuVasive Cannot Be Liable for Inducing UCLA to Breach Such a Duty*

The elements of a negligence cause of action are (1) the existence of a duty to exercise due care, (2) breach of that duty, (3) causation, and (4) damages. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 500.) The court determines the existence of a duty of care as a question of law. (*Id.* at p. 501; *Ann M. v. Pacific Plaza Shopping Center*

(1993) 6 Cal.4th 666, 674, 678.) “ ‘[D]uty’ is not an immutable fact of nature ‘ “but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” ’ [Citation.]” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)

NuVasive’s alleged duty not to induce UCLA to breach UCLA’s duty owed to the plaintiffs derives from and depends for its existence on a duty owed plaintiffs by UCLA.² The plaintiffs contend that UCLA owed them a duty to ensure that the donated bodies would be used in a dignified manner that not would shock the sensibilities of the surviving family members and that the bodies or body parts would not be sold. They contend that UCLA’s duty arose from its representations to donors, and to plaintiffs, to this effect.

In a related case, *Regents of the University of California v. Superior Court* (B210693), filed today, this court relies on *Conroy v. Regents of the University of California, supra*, 45 Cal.4th 1244 to make the following pronouncements concerning

² Plaintiffs cite *Christensen v. Superior Court* (1991) 54 Cal.3d 868. In *Christensen*, defendant Carolina Biological Supply Company (Carolina) was alleged to have purchased human organs and body parts from crematory defendants, who had represented that they would perform cremations in a dignified and respectful manner, and provided forms authorizing cremation to defendant mortuaries to enable them to obtain consent from deceased persons’ next of kin, whose business the mortuary defendants solicited on behalf of themselves and of the crematory defendants. (*Id.* at pp. 877-878.) Although Carolina assumed no duty related to delivery of funeral-related services, it was sued on a theory that “it negligently contracted for and purchased human organs from the crematory defendants under circumstances in which it knew or should have known that the crematories had not complied with the laws of this state, which prohibit removal and sale of human organs absent the consent of the decedent or the statutory right holder. Plaintiffs do not seek to impute liability to Carolina for the negligence of the crematory defendants, but to hold Carolina liable on a theory that it encouraged or induced the unlawful conduct of the crematory defendants. [¶] Negligence in procuring injury-producing conduct of another may subject the negligent actor to liability for that conduct. . . . Where a defendant has induced another to act in circumstances under which it is foreseeable that the conduct will cause injury to a third party, liability is found.” (*Id.* at pp. 891-892, fn. omitted.)

whether the Regents owed duties to surviving family members of a decedent who donated her body to the UCLA Willed Body Program.

First, the document of gift and statutes in the Uniform Anatomical Gift Act (UAGA) (Health & Saf. Code § 7150 et seq.) define the rights and duties of a donee of an anatomical gift. When a donor executes a donation agreement and upon the donor's death, the statutory right to control disposition of the donor's body passes to the donee. The donee becomes the statutory rights holder, whose rights are superior to the rights of others. As the statutory rights holder, the donee has the exclusive right to control disposition of the donor's remains, and may do so in a manner offensive to family members. Thus the donee, defendant Regents, does not owe a duty to plaintiffs regarding disposition of a donor decedent's body. (*Regents of the University of California v. Superior Court, supra*, ___ Cal.App.4th at pp. ____ [at pp. 13-14, 16-17].)

Second, plaintiffs claim negligence arising from breach of the donee's promises and representations to them about the treatment and disposition of donor decedents' bodies. The donee's promises and representations were not found in the UAGA or the in the donation agreement. In those circumstances, promises and representations made outside the document of gift do not create legal duties owed by the donee to plaintiffs. (*Regents of the University of California v. Superior Court, supra*, ___ Cal.App.4th at pp. ____ [at pp. 14-16].)

Because any duty owed by NuVasive to plaintiffs derived from and depended for its existence on a duty owed plaintiffs by UCLA, the absence of duty owed by UCLA to plaintiffs precludes NuVasive's liability for inducing UCLA to breach that alleged duty to plaintiffs. The trial court therefore correctly sustained the demurrers and the judgments of dismissal as to NuVasive should be affirmed.

V. DISPOSITION

The judgments in favor of NuVasive in both actions (Nos. BC311865 & BC348376) are affirmed. Costs on appeal are awarded to defendant NuVasive, Inc.

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KITCHING, J.

I CONCUR:

ALDRICH, J.

1 CROSKEY, J.,

2 I respectfully dissent.

3 The majority's holding that NuVasive, Inc. (NuVasive), owed plaintiffs no duty of
4 care is based on its conclusion in *Regents of University of California v. Superior Court*
5 (B201193) (*Waters*), also filed on today's date, that any representations made by the
6 University of California at Los Angeles (UCLA) outside of the donation agreements
7 created no duty of care as a matter of law, regardless of the content of the representations.
8 My dissenting opinion in *Waters* explains my disagreement with that conclusion. In my
9 view, *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244 (*Conroy*) did
10 not hold or suggest that representations made outside of the donation agreement cannot
11 create a duty of care as a matter of law. I therefore believe that *Conroy* does not preclude
12 the existence of either a duty of care owed by UCLA to plaintiffs in this case or a duty
13 owed by NuVasive not to induce UCLA to breach its duty owed to plaintiffs.

14 Unlike my colleagues, I would determine whether the facts alleged in the
15 complaint are sufficient to establish a duty of care owed by NuVasive to plaintiffs by
16 reference to the general law of negligence and the opinion most directly on point,
17 *Christensen v. Superior Court* (1991) 54 Cal.3d 868 (*Christensen*).

18 1. *Duty of Care in "Direct Victim" Cases*

19 The general rule is that each person has a duty to exercise ordinary care to avoid
20 causing injury to others. (Civ. Code, § 1714, subd. (a); *Rowland v. Christian* (1968)
21 69 Cal.2d 108, 112.) A departure from this fundamental principle is justified only if
22 public policy clearly supports an exception. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th
23 465, 501-502; *Rowland, supra*, at p. 112.) The factors to consider in determining the
24 existence and scope of duty include "the foreseeability of harm to the plaintiff, the degree
25 of certainty that the plaintiff suffered injury, the closeness of the connection between the
26 defendant's conduct and the injury suffered, the moral blame attached to the defendant's
27 conduct, the policy of preventing future harm, the extent of the burden to the defendant
28 and consequences to the community of imposing a duty to exercise care with resulting

liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]”¹ (*Rowland, supra*, at p. 113.)

Liability for emotional distress caused by negligence generally is analyzed by reference to two distinct theories of recovery, the “bystander” and “direct victim” theories. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1071 (*Burgess*).) “Bystander” cases involve a plaintiff who witnessed the injury of another person and suffered emotional distress as a result. The defendant’s duty is a duty to avoid causing emotional distress to persons who observe conduct that causes harm to others. (*Id.* at pp. 1072-1073.) The California Supreme Court has limited the class of bystanders to whom a defendant owes a duty to avoid negligently inflicting emotional distress. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647; see *Dillon v. Legg* (1968) 68 Cal.2d 728, 740-741.)

“Direct victim” cases, in contrast, involve other circumstances where a plaintiff suffers emotional distress as a result of the breach of a duty owed directly to the plaintiff. (*Burgess, supra*, 2 Cal.4th at p. 1073.) The defendant’s duty owed to the plaintiff must be a duty “that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.” (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 590 (*Marlene F.*); accord, *Burgess, supra*, at p. 1073.) In “direct victim” cases, the limits on the existence of a duty that are applicable in “bystander” cases do not apply. (*Burgess, supra*, at p. 1073.) “Rather, well-settled principles of negligence are invoked to determine whether all elements of a cause of action, including duty, are present in a given case.” (*Ibid.*)

2. *Christensen v. Superior Court*

The primary question here is whether NuVasive owed the plaintiffs a duty of care as direct victims.² The opinion most on point is *Christensen, supra*, 54 Cal.3d 868.

¹ These are commonly known as the *Rowland* factors.

² Plaintiffs do not contend NuVasive owed them a duty as bystanders.

54 *Christensen* involved the alleged mishandling of human remains. Family members of the
55 decedents who did not personally observe the mishandling sued the mortuaries and
56 crematoria that had contracted to provide funeral and crematory services. (*Id.* at pp. 876-
57 877.) The plaintiffs also sued Carolina Biological Supply Company (Carolina), which
58 allegedly had purchased body parts from the crematory defendants without the plaintiffs’
59 authorization. (*Id.* at p. 878.) The plaintiffs sought damages for emotional distress.
60 (*Id.* at p. 879.) The trial court ruled on the plaintiffs’ standing to sue. The California
61 Supreme Court regarded the ruling as in the nature of a ruling on a demurrer. (*Id.* at
62 p. 876.)

63 *Christensen, supra*, 54 Cal.3d 868, rejected the defendants’ argument that the right
64 to recover damages for emotional distress caused by the mishandling of human remains
65 was limited to family members who actually witnessed the mishandling, as would be
66 required in a “bystander” case. (*Id.* at p. 886.) *Christensen* stated with respect to the
67 mortuary and crematory defendants: “[w]e recognized in *Marlene F. v. Affiliated*
68 *Psychiatric Medical Clinic, Inc., supra*, 48 Cal.3d 583, 590, that damages for severe
69 emotional distress may be recovered ‘when they result from the breach of a duty owed
70 the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of
71 law, or that arises out of a special relationship between the two.’ Defendants here
72 assumed a duty to the close relatives of the decedents for whose benefit they were to
73 provide funeral and/or related services. They thereby created a special relationship
74 obligating them to perform those services in the dignified and respectful manner the
75 bereaved expect of mortuary and crematory operators.³ The existence of this duty
76 distinguishes the negligence action pleaded here from those of the bystander-witnesses

³. “We recognize that the statutory right holder has the exclusive right to control the disposition of the remains, and may do so in a manner offensive to other family members. [Citation.] This does not preclude liability to those other family members for whose benefit the services were to be performed.” (*Christensen, supra*, 54 Cal.3d at p. 891, fn. 19.)

77 who were plaintiffs in *Thing v. La Chusa*, *supra*, 48 Cal.3d 644, and *Dillon v. Legg*,
78 *supra*, 68 Cal.2d 728.” (*Christensen*, *supra*, 54 Cal.3d at pp. 890-891.)

79 *Christensen*, *supra*, 54 Cal.3d 868, stated that Carolina, in contrast, did not assume
80 any duty related to funeral services, but held that Carolina as the purchaser of body parts
81 could be liable based on another duty: “[w]e agree that Carolina, unlike the other
82 defendants, did not assume any duty related to the delivery of funeral-related services.
83 One theory on which it is sued, however, is that it negligently contracted for and
84 purchased human organs from the crematory defendants under circumstances in which it
85 knew or should have known that the crematories had not complied with the laws of this
86 state, which prohibit removal and sale of human organs absent the consent of the
87 decedent or the statutory right holder. Plaintiffs do not seek to impute liability to
88 Carolina for the negligence of the crematory defendants, but to hold Carolina liable on
89 a theory that it encouraged or induced the unlawful conduct of the crematory defendants.

90 “Negligence in procuring injury-producing conduct of another may subject the
91 negligent actor to liability for that conduct. ‘A’s own wrong may have contributed in
92 some way to the causing of harm to C through B’s wrongful conduct. A may have
93 commanded or procured that very wrong.’ (5 Harper et al., *The Law of Torts*
94 (2d ed. 1986) § 26.1, p. 3.) Where a defendant has induced another to act in
95 circumstances under which it is foreseeable that the conduct will cause injury to a third
96 party, liability is found.

97 “This principle, recognized in section 302A of the Second Restatement of Torts,
98 underlies the decision of this court in *Pool v. City of Oakland* (1986) 42 Cal.3d 1051
99 [232 Cal.Rptr. 528, 728 P.2d 1163]. There we held that a supermarket which negligently
100 accused a customer of felonious conduct and summoned police, could foresee that the
101 resulting police investigation and arrest of the innocent plaintiff would cause emotional
102 distress for which the supermarket was liable. While the police conduct may have been
103 wrongful, the defendant was a proximate cause of the injury. (*Id.* at pp. 1064, 1065.)
104 ‘If the likelihood that a third person may react in a particular manner is a hazard which
105 makes the actor negligent, such reaction whether innocent or negligent does not prevent

the actor from being liable for the harm caused thereby.’ [Citations.]” (*Christensen, supra*, 54 Cal.3d at pp. 891-892.)

Christensen concluded that if it was reasonably foreseeable that Carolina’s offering to purchase substantial quantities of body parts from the crematory defendants would induce those defendants to remove body parts for the purpose of sale without the required consent of the statutory right holders, Carolina could be liable to the statutory right holders for their resulting emotional distress. (*Christensen, supra*, 54 Cal.3d at pp. 893-894.)

Considering the *Rowland* factors, *Christensen* concluded that the imposition of a duty of care was consistent with the moral blame attached to the defendants’ conduct and that potential liability would promote the goal of preventing future harm of a similar nature. (*Christensen, supra*, 54 Cal.3d at pp. 894, 896-898.) Because the number of close relatives who were aware that funeral-related services were being performed and for whose benefit the services were rendered was relatively small and because the “egregious and intentional” misconduct was within the defendants’ control, *Christensen* concluded that the burden to the defendants and consequences to the community of imposing a duty of care were acceptable and that the cost of preventing similar misconduct was minimal. (*Id.* at p. 898.)

3. *Christensen Compels the Conclusion that Plaintiffs Adequately
Allege a Duty of Care*

The California Supreme Court in a series of opinions involving negligence by health care providers has held that a plaintiff qualifies as a “direct victim” to whom the defendant owes a duty of care only if the plaintiff was a patient of the defendant or the defendant’s injury-producing conduct was directed at the plaintiff. (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 130-131; *Burgess, supra*, 2 Cal.4th at p. 1075; *Marlene F., supra*, 48 Cal.3d at p. 590; *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 172-173; *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 923.) *Christensen, supra*, 54 Cal.3d 868, in contrast, did not involve a health care provider. The holding in *Christensen* regarding the duty of care was not based on the

135 court's consideration of the nature of the relationship between the plaintiffs and a health
136 care provider, and concerns regarding the effect of the imposition of a duty of care on the
137 provision of health care services (see *Huggins, supra*, 6 Cal.4th at p. 133) played no role
138 in the decision. Instead, the holding in *Christensen* was based on the court's
139 consideration of the nature of the relationship between the plaintiffs and the defendants
140 that were involved in the handling of the decedents' remains.

141 *Christensen* held that in light of the nature of the services provided by the
142 mortuary and crematory defendants, those defendants assumed a duty to all close family
143 members for whose benefit the services were performed to perform those services in
144 a respectful and dignified manner so as not to cause emotional distress. (*Christensen*,
145 *supra*, 54 Cal.3d at pp. 890-891.) The rule that emerges from *Christensen* with respect to
146 a purchaser of human body parts, such as NuVasive, in contrast, is that a purchaser who
147 induces the seller to breach its duty owed to close family members in a way that may
148 result in a foreseeable emotional injury to the family members owes the family members
149 a duty of care if consideration of the other *Rowland* factors supports the existence of a
150 duty. (*Id.* at pp. 891-892.)

151 In my view, the holding in *Christensen, supra*, 54 Cal.3d 868, did not depend on
152 the existence of a *statutory* duty on the part of the crematory defendants. Rather,
153 *Christensen* referred to liability based on "procuring injury-producing conduct of
154 another" in circumstances where the injury is foreseeable. (*Id.* at p. 892.) The fact that
155 the crematory defendants in *Christensen* owed a statutory duty of care to the plaintiffs not
156 to dispose of the remains without their prior consent does not compel the conclusion that
157 liability is limited to only those circumstances. The plaintiffs here allege that UCLA
158 owed them a duty of care based on its prior representations and that NuVasive induced
159 UCLA to breach that duty. I can discern no good reason to limit a defendant's duty of
160 care based on inducing another person to breach its duty owed to the plaintiff to
161 circumstances where that person's duty is based on a statute.

162 *Christensen, supra*, 54 Cal.3d 868, differs from this case in that the plaintiffs in
163 *Christensen* reasonably expected their loved ones to receive a dignified burial or
164 cremation without dissection or dismemberment for any purpose. Here, in contrast, the
165 donors and their families understood that the bodies would be dissected or dismembered
166 for purposes of medical research and education. I believe, however, that the same
167 concerns of respect for human remains and for the consolation of surviving family
168 members support a duty of care in these circumstances where UCLA allegedly made
169 assurances that the donated bodies would be treated with dignity and respect, that they
170 would be used only by “medical faculty, students, staff, or students in health-related
171 professions,” and that bodies or body parts could not legally be sold. Just as the
172 funeral-related services in *Christensen* were provided primarily for the benefit of
173 bereaved family members, the alleged representations concerning the restricted uses of
174 the remains provided some comfort to bereaved family members concerned about the
175 disposition of their decedents’ remains. Although NuVasive, like Carolina in
176 *Christensen*, “did not assume any duty related to the delivery of funeral-related services”
177 (*id.* at p. 891), NuVasive allegedly induced UCLA to breach its duty owed to plaintiffs by
178 selling body parts in circumstances in which it was foreseeable that emotional injury
179 would result. (See *id.* at p. 892.)

180 Consideration of the *Rowland* factors supports the existence of a duty of care in
181 these circumstances. Plaintiffs’ emotional injury caused by the alleged improper sale and
182 mistreatment of the remains of their close relatives was clearly foreseeable. (*Christensen*,
183 *supra*, 54 Cal.3d at pp. 894-896.) Based on only the allegations of the complaint, there is
184 no reason to doubt either the fact of emotional injury or the close connection between the
185 alleged misconduct and the harm suffered. (*Ibid.*) The moral blame of a purchaser of
186 human remains who knew or reasonably should have known that the remains were not
187 intended for sale or for the uses to which the purchaser put the remains, and who
188 purchased the remains through a middleman in order to avoid detection, is high. (*Id.* at
189 pp. 896-898.) The imposition of a duty of care would discourage similar misconduct in
190 the future and therefore would further the policy of preventing further harm. The burden

on a purchaser of human remains to ensure that its purchase and use of remains does not violate any restrictions intended for the benefit of the decedents' family members would not be so great a burden as to suggest that the imposition of a duty of care would be inappropriate. Moreover, there is no indication that the imposition of a duty would significantly impair the purchaser's ability to obtain remains for medical research or that the community would suffer as a result. Finally, although insurance may not be available to protect a purchaser from liability to the extent that its misconduct was intentional, the cost of avoiding similar misconduct in the future is minimal. (*Id.* at p. 898.)

Melican v. Regents of University of California (2007) 151 Cal.App.4th 168 is not on point. *Melican* involved UCI's Willful Body Program. *Melican* held that the defendant, in voluntarily returning the decedent's cremated remains, had no duty to ensure that the remains were not commingled with those of other decedents. (*Id.* at pp. 180-181.) The plaintiffs in *Melican* did not allege that UCI had represented that the remains would be segregated (see *id.* at p. 180), and *Melican* did not discuss whether such a representation could create a duty of care.

I conclude that the facts alleged in plaintiffs' complaint are sufficient to establish a duty owed by NuVasive not to induce UCLA to breach its duty owed to plaintiffs in a manner that would cause them foreseeable emotional injury.

4. *Plaintiffs Do Not Adequately Allege Causation*

NuVasive did not argue in the trial court in support of its demurrers that plaintiffs failed to adequately allege causation, and the parties did not address the issue in their appellate briefs. We requested supplemental briefing on this issue following the Supreme Court's transfer of the cause to this court. An appellate court may consider for the first time on appeal an issue of law that does not involve the resolution of disputed facts, provided that the parties are afforded a reasonable opportunity to address the issue, which we have provided. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341.)

218 A plaintiff seeking to recover damages for the negligent infliction of emotional
219 distress must “establish a direct causal connection” between the defendant’s misconduct
220 and the plaintiff’s emotional distress. (*Christensen, supra*, 54 Cal.3d at p. 902.)
221 *Christensen* stated: “Media reports of a general pattern of misconduct are not sufficient,
222 in and of themselves, to establish that defendants’ misconduct included mishandling of
223 the remains of each plaintiff’s decedent. Thus, an allegation that a plaintiff suffered
224 emotional distress on learning of that pattern of misconduct does not allege injury caused
225 by a breach of a duty owed to the plaintiffs.” (*Id.* at p. 901; accord, *Conroy, supra*,
226 45 Cal.4th at p. 1251.)

227 *Christensen* stated further: “A plaintiff who is unable to establish that he or she
228 suffered severe emotional distress, and that the emotional distress was caused by
229 a well-founded substantial certainty that his or her decedent’s remains were among those
230 reportedly mistreated, may not recover damages. A generalized concern that the remains
231 of a relative may have been involved, arising out of a media report of a pattern of
232 misconduct, is insufficient to satisfy the requirement that there be a direct connection
233 between a defendant’s conduct and the injury suffered by the plaintiff. It does not supply
234 a necessary element—that the injury, here emotional distress, be caused by a breach of
235 the defendant’s duty to the particular plaintiff. [Citations.]” (*Christensen, supra*,
236 54 Cal.3d at p. 902; accord, *Conroy, supra*, 45 Cal.4th at p. 1251.)

237 *Christensen* concluded that the allegation in the complaint that the plaintiffs
238 “learned from the media reports that the remains of ‘their’ decedents had been improperly
239 treated” alleged “a sufficiently direct causation between defendants’ conduct and the
240 emotional distress suffered by plaintiffs” for pleading purposes. (*Christensen, supra*,
241 54 Cal.3d at p. 901.)

242 Plaintiffs here allege a general pattern of misconduct by the defendants, including
243 NuVasive, and they broadly allege that they suffered emotional distress as a result. In my
244 view, these allegations do not adequately allege an injury caused by the breach of a duty
245 owed to plaintiffs. (*Christensen, supra*, 54 Cal.3d at p. 901.) Plaintiffs do not allege that
246 they knew, or had reason to believe to a substantial certainty, that the bodies of their

247 decedents were among those illicitly sold or mistreated and that they suffered emotional
248 distress as a result of that knowledge or belief. (See *ibid.*) Absent allegations of a
249 sufficiently direct causal connection between defendants' misconduct and plaintiffs'
250 emotional injury, the complaints fail to adequately allege causation.

251 Plaintiffs represent that they can truthfully allege facts in accordance with these
252 requirements if they are granted leave to amend their complaints. I therefore would
253 reverse the judgments in favor of NuVasive in both actions with directions to grant
254 plaintiffs leave to amend the complaints as to negligence.

255 5. *Plaintiffs Have Shown No Error in the Sustaining of the Demurrers to*
256 *the Counts for Fraud and Intentional Infliction of Emotional Distress*

257 Plaintiffs do not separately address the fraud counts and therefore abandon any
258 claim of error as to those counts. (*Tiernan v. Trustees of Cal. State University &*
259 *Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451,
260 466, fn. 6.) In their brief discussion of the counts for intentional infliction of emotional
261 distress, plaintiffs fail to cite or discuss any legal authority to support their argument.
262 They therefore abandon any claim of error as to those counts as well. (*Badie v. Bank of*
263 *America* (1998) 67 Cal.App.4th 779, 784-785.)

264 6. *Conclusion*

265 Accordingly, I would direct the trial court to vacate the order in each of these
266 consolidated actions sustaining NuVasive's demurrer to the entire complaint without
267 leave to amend and enter a new order in each action sustaining the demurrer to the
268 negligence count with leave to amend and sustaining the demurrer to the other counts
269 alleged against NuVasive without leave to amend.

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272 CROSKEY, J., Acting P. J.